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No. 675

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# Supreme Court of the United States

OCTOBER TERM, 1958

IRVING D. FRIEDMAN,

*Appellant,*

*against*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Appellees.*

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK*

## JURISDICTIONAL STATEMENT.

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# Supreme Court of the United States

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## JURISDICTIONAL STATEMENT.

Appellant files this Jurisdictional Statement in compliance with paragraph 2 of Rule 13, and Rule 15, of the Rules of this Court.

### (a) Opinions Below.

The report of the Interstate Commerce Commission in this case is reported in 295 I. C. C. 731. It is attached to the Complaint, which is in the record. The opinion of the United States District Court, Southern District of New York, which affirmed the report of the Commission has not yet been officially reported. It is Opinion No. 24757, dated December 23, 1958, filed with the Clerk of the United States District Court, Southern District of New York, in Civil Action File No. 138-351. The opinion of the District Court is set forth in full in the Appendix hereto at pages 18 to 25.

## (b) The Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked.

(i) The action in the United States District Court, Southern District of New York, was instituted by Appellant, pursuant to Title 28, United States Code, Sections 1336, 2284, 2321 to 2325, and Title 5, United States Code, Section 1009, to review, annul and set aside the Report and Order of the Interstate Commerce Commission which had authorized the mergers of the Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company into the Illinois Central Railroad Company. The aforementioned railroad corporations, hereinafter referred to as "Alabama", "Vicksburg", and Illinois Central, intervened as parties defendant in the District Court, and each of them is an appellee in this action.

The railroads had filed applications to merge the "Alabama" and the "Vicksburg" into the Illinois Central, pursuant to Section 5(2) of the Interstate Commerce Act, Title 49 of the United States Code, Section 5, and the Commission had approved the terms of the merger as proposed by the railroad appellees.

(ii) The orders and judgments sought to be reviewed are: the report and order of the Interstate Commerce Commission, dated April 14, 1958; the order of the Commission denying appellant's motion for a reconsideration, dated September 29, 1958; and the order and judgment of the United States District Court, Southern District of New York, dated December 23, 1958. The notice of appeal to the Supreme Court of the United States was filed in the United States District Court, Southern District of New York, on December 26, 1958.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1253.

(iv) Cases sustaining the jurisdiction of this Court are: *Schwabacher* v. *United States*, 334 U. S. 182; *Alleghany Corporation* v. *Breswick*, 353 U. S. 151; and *County of Marin* v. *United States*, 356 U. S. 412.

(v) The pertinent part of the statute of the United States that is involved in this case is Section 5(2) of the Interstate Commerce Act, Title 49 U. S. Code, Section 5(2) which provides:

"Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case

carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable."

## (c) The Questions Presented by the Appeal.

This case presents the following questions:

(1) Does Section 5(2) of the Interstate Commerce Act, which gives the Commission the power to merge railroads on terms that are just and reasonable, give the Commission the power to void a long term lease between two railroads, where there are minority stockholders who have a vested interest in the lease?

(2) Does the Commission have the power, in approving a merger under Section 5(2) of the Interstate Commerce Act, to capitalize the income from a long term lease, payable by a solvent railroad, and require the lessor to take less than the total amount of the rental required to be paid over the term of the lease?

(3) Where a leased line stockholder's Capital Stock is being taken away from him in a merger

under Section 5(2) of the Interstate Commerce Act, is such stockholder entitled to the rental under the lease, and, in addition, to have his Capital Stock appraised, in the merger proceeding, on the basis of the actual earning power of his corporation?

### (d) The Material Facts of the Case.

Appellant is a stockholder in the "Alabama" and in the "Vicksburg" companies. In 1925 the "Alabama" and the "Vicksburg" companies leased all of their properties to a predecessor in interest of the Illinois Central for terms of 357 years, expiring July 1, 2282, at a rental equal to six per cent (6%) on the $100 par value of the Capital Stock of "Alabama", and five per cent (5%) on the $100 par value of the Capital Stock of "Vicksburg", which was then outstanding.

The leases were filed with The New York Stock Exchange, where the "Alabama" and "Vicksburg" stocks were listed, and endorsements summarizing the payments required to be made by the Illinois Central, the term of the leases, and Illinois Central's unconditional guarantees of the due and punctual payment of all sums required to be paid by the Lessee, were imprinted on each stock certificate of the "Alabama" and "Vicksburg".

On the effective date of the leases, the "Alabama" and the "Vicksburg" companies transferred their franchises, real and personal property, and all of their other assets, to the Illinois Central. From that time on, the "Alabama" and "Vicksburg" conducted no operations and had no business whatsoever. The Illinois Central received all of the revenue from the operation of the "Alabama" and "Vicksburg" properties, and paid all of the expenses. The Illinois Central, the tenant under the leases, also paid, and is paying, the annual rental of 6% of the par value of the Capital

Stock of the "Alabama", amounting to $6 per share per year, and 5% of the par value of the "Vicksburg", amounting to $5 per share per year, directly to appellant and all other holders of "Alabama" and "Vicksburg" stock.

The leases terminate on July 1, 2282. They have no earlier termination date. They have no cancellation privileges. The leases authorize mergers only on the condition that a merger shall not release or diminish the obligation of the tenant thereunder, Illinois Central, to pay the rental.

In 1951, Illinois Central began to purchase the capital stock of "Alabama" and "Vicksburg" in the open market. It purchased and now owns 40,123 shares of the 42,000 shares of "Alabama". It purchased and now owns 48,552 shares of the 49,993 shares of "Vicksburg". Appellant owns and represents 480 shares of "Alabama" and 80 shares of "Vicksburg".

In 1957, Illinois Central filed, with the Interstate Commerce Commission, the merger applications which are the subject matter of this case. Illinois Central petitioned the Commission, under Section 5(2) of the Interstate Commerce Act, for approval to merge the "Alabama" into itself, upon payment to the "Alabama" stockholders of $155 worth of Illinois Central's common stock on the effective date of the merger.

Illinois Central asked for similar Commission approval to merge the "Vicksburg" into itself, upon payment to the "Vicksburg" stockholders of $126.50 worth of Illinois Central's common stock, based on the market value of Illinois Central common stock on the effective date of the merger.

Appellant and all other minority stockholders of "Alabama" and "Vicksburg" are given the option to take the $155 and $126.50 in cash if they do not want to take Illinois Central's common stock.

The merger applications propose that the leases between "Alabama", "Vicksburg" and Illinois Central, will be swallowed up and dissolved by operation of law, upon the consummation of the merger; and that appellant's rights, as a stockholder of "Alabama" and of "Vicksburg", and his rights under the leases, and on the guarantees of rental payments endorsed on his stock, wil all be extinguished.

Appellant intervened in the merger proceedings before the Commission, and objected that the terms of the mergers were contrary to law.

The first of appellant's grounds on which he based his contention that the proposed mergers are contrary to law is that the rental payments required to be made on the Capital Stock of "Alabama" and "Vicksburg" until July 1, 2282, are fixed charges and obligations of Illinois Central, which cannot legally be terminated by a merger.

The obligation of Illinois Central to pay the rental under the leases, and the concurrent liability to pay the guaranteed 6% and 5% annual rental on appellant's holdings of "Alabama" and "Vicksburg" stock, over the term of the leases, amounts to $1,942.50 on each share of "Alabama" and $1,618.75 on each share of "Vicksburg". Appellant contended before the Commission that this liability owing by Illinois Central could not be reduced by the act of merging. Such liability, appellant contended before the Commission, must be paid, or assumed, by the company surviving the merger.

Appellant contended before the Commission that when Illinois Central leased the "Alabama" and "Vicksburg" in 1925, it agreed to become liable for the payment of the rental for the duration of the lease; that is, until July 1, 2282.

The second of appellant's grounds of objection to the mergers is that the applications for the mergers failed to

disclose what was the actual value of the "Alabama" and of the "Vicksburg" companies. Appellant contended before the Commission that under the leases and guarantees of rentals, he was entitled to payment of all of the rent required to be paid thereunder; and after receiving that, appellant, being the owner of his pro rata share of the equity of "Alabama" and "Vicksburg", was entitled, as a matter of law, to have the Commission find the value of these companies, based on their earning power and other assets, and to order the payment of such value to appellant.

Appellant contended before the Commission that because the applicants favoring the merger furnished no evidence whatsoever of the assets and earning power of the "Alabama" and "Vicksburg" company, it was impossible to ascertain the values of such companies. On the record before the Commission, no one could tell what they were worth.

The Commission overruled appellant's objections, and approved the mergers. In its report, the Commission held that it had the power to capitalize the value of the rental income payable by Illinois Central to appellant, under the terms of the lease, and to require appellant to take, in full compensation of his rights, not the full rental payable over the term of the leases, but the current capitalized value of such rental.

The Commission also held that appellant was not entitled to a valuation of his "Alabama" and "Vicksburg" shares of Capital Stock, based on the actual earning power and actual value of these corporations, because appellant's "Alabama" and "Vicksburg" corporations had leased away their actual earning power and actual value to Illinois Central. The Commission held that appellant had no rights whatever to the assets and earning power of his corpora-

tions because appellant was strictly limited to the leases, and the income therefrom.

Appellant then brought an action in the District Court to annul and set aside the report and order of the Commission. The District Court agreed with the Commission, and confirmed the Commission's report and order. The opinion of the District Court held that appellant had no vested rights whatever in the leases of the "Alabama" and "Vicksburg" companies to the Illinois Central because appellant was not a party to them.

The District Court held that Illinois Central's guarantee of the due and punctual payment of a sum equal to 6% of the par value of the Capital Stock of "Alabama", and to 5% of the par value of the Capital Stock of "Vicksburg", endorsed on appellant's shares of stock, did not give appellant any claim against Illinois Central for such rental payments. The District Court's opinion held that appellant was just a common stockholder in his companies, with no rights at all against Illinois Central on the leases requiring rental payments for 323 years to be paid on appellant's Capital Stock in "Alabama" and "Vicksburg".

## (f) The Questions Presented are Substantial.

### (1) The Merger Terms Are Not Just and Reasonable, as required by Section 5(2) of the Interstate Commerce Act, Because They Violate the Obligation of Contract.

It is a principle of law that liabilities owing by solvent corporations cannot be impaired or diminished by the act of merging. All liabilities of merging corporations must be paid, or preserved unimpaired and assumed by the corporation surviving the merger.

The Commission and the District Court allowed the Illinois Central to merge, without continuing to remain

liable for the payment of a liability it owed before the merger. The Commission and the District Court allowed the Illinois Central to use the merger process as a device to break a long term lease.

The District Court held that, under its statutory power to merge railroads, the Commission has the power to appraise the value of a long term lease, and to require the lessor to take such current appraised value, even though it is substantially less than the rental stipulated in the lease, in full extinguishment of the lessor's rights.

Appellant contends that in coming to such a conclusion, the Commission and the District Court departed from the law, because the law does not authorize the appraisal of liabilities owing by solvent corporations. In approving the mergers on the basis that Illinois Central can pay less than what it owed before the mergers, the Commission and the District Court have legalized a breach of contract. Therefore appellant is entitled to have the Commission's approval of the mergers annulled, as a matter of law.

The $155 per share which the Commission and the District Court require appellant to accept as full compensation for his 6% "Alabama" stock, amounts to the rental for only 26 years. The lease obligates Illinois Central to make such rental payments for 323 more years, that is until July 1, 2282, and the total amount of such rental payments under the lease is $1,942.50 per share. It is not just and reasonable to allow Illinois Central to discharge an obligation for 323 years rent by the payment of 26 years rent.

The Commission and the District Court attempt to justify their conclusion, which allows Illinois Central to settle an obligation for 323 years rent by the payment of 26 years rent, on the ground that the Commission has the right to capitalize the income payable to appellant under the lease, and to pay appellant such current capitalized

value. Such a practice is not authorized by law, and it is not authorized by the leases.

The total amount of rent payable by Illinois Central over the term of the lease is $1,942.50 per share, and it cannot be commuted to $155 by an appraisal. Liabilities of solvent corporations must be paid, or assumed, at their actual amount. There is no authority for a corporation that is able to pay its debts, to have its liabilities appraised, and paid off at an appraised value which is substantially less than what it actually owes.

Allowing this claim of $1,942.50 to be redeemed by the payment of $155 is tantamount to payment at 8% of its face value. Authorizing a debtor to pay off a claim at 8¢ on the dollar is the kind of relief given to a bankrupt debtor in a bankruptcy proceeding. It is not relief that should be given to a solvent debtor in a merger proceeding under Section 5(2) of the Interstate Commerce Act.

**(2) There Is No Reasonable Basis for the Commission's Conclusion That $155 and $126.50 Are Fair Prices for the "Alabama" and "Vicksburg" Shares of Capital Stock.**

In addition to the question of the Commission's right to commute a long term, non-cancellable lease, there is the question of the value of appellant's "Alabama" and "Vicksburg" stocks. The stockholders of "Alabama" and of "Vicksburg" own the equity of their railroads, subject to the terms of the leases to Illinois Central, and this equity has a present value.

Appellant has separate and cumulative rights, as a stockholder in his companies under their charters. Appellant is entitled to be compensated for the value of such equity, when his stock is being taken away from him in a merger.

Appellant should receive payment in full of all the rental he is entitled to under the leases, owed to him by Illinois Central, and, in addition to that, he is entitled to be paid the just and reasonable value of his stock.

Earning power is the proper standard to use to determine the value of a stock. The Commission did not examine the earning power and values of the "Alabama" and "Vicksburg" companies. There is no evidence whatever in the record of the earning power and values of the "Alabama" and "Vicksburg" companies, which are being absorbed in this merger. It is therefore impossible to ascertain what they are worth.

The Commission and the District Court attempt to justify this absence in the record of the actual earning power and value of the "Alabama" and "Vicksburg" companies by stating that appellant is not even entitled to know what the actual values of his companies are, because his companies leased away such value to the Illinois Central. In applying this reasoning to the appellant, the Commission and the District Court made the appellant the victim of unjust and irreconcilable reasoning.

When appellant contended before the Commission and the District Court that he was a creditor and landlord of the Illinois Central, under the leases, in proportion to his holdings of shares in "Alabama" and "Vicksburg", and urged the Commission and the Court to uphold the leases and continue the rental payments required to be made, the Commission and the Court below denied that appellant had any contractual rights at all under the leases. The District Court held that the leases were made by the corporations, and for that reason appellant had no vested interest therein, and had only the rights of a common stockholder.

When appellant asked that his rights as a stockholder in "Alabama" and "Vicksburg" be valued by the Commission on the basis of the actual earning power of appellant's companies, the Commission and the Court below held that appellant was no longer a common stockholder, but was a fixed income stockholder whose rights were confined to the terms of the leases made by his corporations.

What the Commission and the District Court did to the appellant was to treat him as a common stockholder when appellant pointed out his contractual rights under the leases; and to treat appellant as a leased line stockholder, limited to a fixed rental income, when appellant asked for his rights as a common stockholder.

The inconsistency and illegality of what the Commission and the District Court did, was to take away appellant's leasehold rights to receive his guaranteed rentals of $6 a year, and $5 a year, for 323 years, and then confine him to such leasehold rights when appellant asked the Commission to determine the actual value of his railroads.

When it was to Illinois Central's advantage to deny appellant his rentals under the lease, the Commission and the District Court ruled that appellant was a common stockholder with no leasehold rights. When it was to Illinois Central's advantage to deny appellant's rights as a common stockholder, the Commission and the District Court ruled that appellant's rights were strictly limited to the lease, and that appellant had no rights as a common stockholder.

The Commission and the District Court gave appellant all of the disadvantages of a creditor holding a fixed income security, and all of the disadvantages of a common stockholder, and they gave appellant none of the advantages. The Commission and the Court below denied to appellant the rental that the holder of a fixed income, leased line,

security is entitled to receive; at the same time, they denied him the right to an evaluation of his shares, based on the actual earnings of his company, that the holder of a common stock enjoys.

It is respectfully submitted that the Commission and the Court did not fully appreciate the dual characteristics of the "Alabama" and "Vicksburg" shares of Capital Stock owned by appellant.

Before the leases were made in 1925, the "Alabama" and "Vicksburg" shares of Capital Stock were ordinary shares of common stock. When these companies leased all of their assets to Illinois Central, it converted the common stockholders of "Alabama" and "Vicksburg" to guaranteed fixed income stockholders. Their shares of common stock had all of the characteristics of a long term non-callable bond superimposed on them by the execution of the leases. On and after the effective date of the leases, the "Alabama" and "Vicksburg" stockholders no longer shared in the profits and losses of their companies, but were entitled to receive, in lieu thereof, a fixed annual income of $6 and $5 a share until July 1, 2282. Appellant does not want to change this contract.

Appellant does contend that if the Commission and Illinois Central want to take these leases away from him, then his status reverts to that of a common stockholder, and appellant is no longer bound by the limitations of the lease that is being dissolved by the merger, and he is entitled to have his stock measured by its actual value—not by its value limited by the lease.

For this merger to be just and reasonable under the requirements of law and Section 5(2) of the Interstate Commerce Act, the Commission should impose the condition that Illinois Central perform all of its obligations

under the leases in full; not at any appraised or commuted values. Then, after Illinois Central has redeemed the leases by paying the full rental it owes of $1,942.50 for each share of "Alabama" and $1,618.75 for each share of "Vicksburg", the Commission should find the just and reasonable value, based on the actual earnings and assets, of the "Alabama" and "Vicksburg" companies.

Payment to the "Alabama" and "Vicksburg" stockholders of all their rent, plus the actual value of their companies, will constitute just and reasonable terms for this merger. Until Illinois Central does that, the mergers should be enjoined.

**(3) The Questions Presented Are So Substantial as to Require Plenary Consideration.**

Although this case is important to the parties, it is of importance far beyond its particular facts. What is involved here is the tremendously important principle of whether a railroad system can cancel its obligations under a long term lease by a merger. Can a corporation, which is liable as a tenant under a non-cancellable lease, force a substitution of its common stock, in exchange for the lease, by a merger?

If the Commission's action is approved, then a tenant railroad will receive legal sanction to wipe out a long term lease between it and its landlord, contrary to the landlord's contractual rights, merely by merging and substituting the tenant's common stock for the lease.

Under the authority of the Commission's ruling in this case, no guaranteed leased line stock has any stability. For example, the Pennsylvania Railroad could terminate its 900 year obligation under its lease with the United New Jersey Railroad & Canal Co. by merging, and paying the leased line stockholders the investment value of their $10 annual dividend, in Pennsylvania Railroad common stock or cash.

Another example is that the New York Central could wipe out the lease of the New York & Harlem Railroad stockholders by merging, and merely paying them the current capitalized value of the $5 guaranteed dividend, in common stock of New York Central, or in cash.

The Supreme Court should hear this case, with briefs on the merits and oral argument, for their resolution, to determine whether it is just and reasonable for the Interstate Commerce Commission to allow a railroad to break a lease, and to compel the stockholders of the landlord corporation to take the common stock of another railroad in exchange for the lease.

It is respectfully submitted that a plenary consideration of the basic question presented on this appeal, and a statement of this Court's position after such consideration, will avoid confusion and misunderstanding of the rights of guaranteed leased line stockholders, under their leases and shares of Capital Stock, in merger proceedings under Section 5(2) of the Interstate Commerce Act.

### (g) The District Court Abused Its Discretion by Denying Appellant an Injunction Against the Mergers.

The District Court abused its discretion by denying appellant an injunction against the proposed mergers because the mergers deprived appellant of his clear legal rights. Appellant was entitled to an injunction to prevent a violation of the obligations of his contracts.

Appellant was also entitled to an injunction on the grounds that the terms of the mergers denied him the right of every corporation stockholder, whose stock is being taken away in a merger, to have his stock appraised on the basis of the actual earning power and actual value of his corporation.

The Commission never valued the "Alabama" and "Vicksburg" companies. All it did value was the income appellant was receiving under the leases.

Appellant was entitled to an injunction as a matter of right against such illegal conduct of the Commission, and the District Court abused its discretion in denying such injunction.

January 19, 1959

Respectfully submitted,

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## APPENDIX.

### The Opinions Below.

IRVING D. FRIEDMAN, Plaintiff, *v.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

United States District Court, Southern District of New York. Civil Action No. 138-351. Opinion #24757.

Before: SWAN, Circuit Judge, and RYAN and HERLANDS, District Judges.

SWAN, Circuit Judge:

This suit comes before a three-judge district court pursuant to 28 U. S. C. A. §§1336, 1398, 2284, 2321-2325, and 5 U. S. C. A. §1009. It seeks to annul and set aside a report and order of the Interstate Commerce Commission dated April 14, 1958, 295 I. C. C. 731, which authorizes the mergers of The Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport and Pacific Railway Company into the Illinois Central Railroad Company, and to enjoin enforcement of the order. For brevity the railroads will be referred to respectively as Alabama, Vicksburg and Illinois Central. The railroad corporations have been allowed to intervene as defendants. Plaintiff's application to the Commission for reconsideration of the report and order was denied by order dated September 29, 1958. Hence he had exhausted administrative remedies prior to filing the present suit in October, 1958. Joint answers to the complaint were filed by the United States and the Interstate Commerce Commission praying that the complaint be dismissed. The intervening railroads have also answered and asked for dismissal of the complaint.

The order under attack was issued pursuant to powers conferred upon the Commission by §5(2)(b) of the Interstate Commerce Act, as amended, 49 U. S. C. A. §5(2)(b), which authorizes the Commission to approve a merger of railroads which it finds "consistent with the public interest" on such terms as it finds "to be just and reasonable."

The proceedings before the Commission were initiated by the intervening railroads' applications for authority to merge. A public hearing was had at which the present plaintiff was heard in opposition to the railroads' application. A brief statement of the underlying facts will suffice. By lease dated March 31, 1925 Alabama, as lessor, leased its railroad to the Yazoo and Mississippi Valley Railroad Company, as lessee, for a term expiring July 1, 2282. The lessee covenanted to pay rent, which included (among other things), a sum equal to six per cent of the par value of the capital stock of the lessor outstanding on the date of the lease. By agreement between Alabama and Illinois Central the latter guaranteed payment by the lessee of all sums required to be paid by it under the aforesaid lease.[1] Illinois Central, as successor to the original lessee, is now operating the properties of Alabama and is subject to the obligations of the original lessee.

Plaintiff is a minority stockholder in both the Alabama and the Vicksburg companies and also claims to be a creditor of the Illinois Central.[2] His brief asserts that "By virtue of the leases, the Alabama and the Vicksburg stockholders became the landlord and creditor of the Illinois Central, in addition to retaining their rights and status as stockholders of their own companies." From this premise he argues (1) that the leases are legal impediments to a merger because the obligation of the Illinois Central to make rental payments until July 1, 2282 cannot legally be terminated by merger; (2) that the compensation of $155 per share for his Alabama stock and $126.50 per share for his Vicksburg stock, which he is offered under the terms of the merger, is an illegal confiscation of his property; and (3) that the Commission erred in not considering evidence of the values of the leased railroads.

[1] On the same date Vicksburg, as lessor, executed a similar lease, and Illinois Central gave a similar guaranty that a sum equal to five per cent of the par value of the lessor's outstanding capital stock would be paid. As the issues are the same under both leases, we shall discuss only the Alabama lease and guaranty.

[2] At the time of the order under attack plaintiff owned about one per cent of Alabama stock and one half per cent of Vicksburg stock.

Plaintiff's claim that he is a creditor of Illinois Central and is entitled to receive payments of $6 per year on each share of his Alabama stock, until July 1, 2282, is based on two theories: (1) that the lease bound the lessee to make to stockholders of Alabama annual payments of $6 per share until July 1, 2282, and (2) that Illinois Central contracted with Alabama's stockholders to make such payments by reason of endorsements on their stock certificates. Plaintiff is mistaken in thinking that the lessee entered into any contractual relationship with the lessor's stockholders. The terms of the lease are very specific in stating that the lessee's promises run only to the lessor. These specific provisions are set forth in the margin.[3] Section 1 of Article

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[3] Section 2 of Article Two reads as follows:

> "SECTION 2. The lessee covenants to and with the lessor to pay yearly and every year during the existence of this lease, and for any part of a year in proportion, the following amounts:
>
> * * * * * *
>
> (g) To the lessor a sum semi-annually, on the first day of April and October of each year during the term of this lease, equal to six per cent (6%) of the par value of the present outstanding capital stock of the Lessor, * * *
>
> It is agreed that said semi-annual payments, or any of them, must be made to the Lessor, if it so instructs the Lessee by timely notice in writing, but, in the absence of such instruction from the Lessor, the Lessee may make said semi-annual payments either to the Lessor or directly to the stockholders of record of the Lessor, as the Lessee may, from time to time, and at any time, elect. Any such payments made to the stockholders shall be in the proportion of their respective holdings of shares, and in case of such payment directly to the stockholders, evidence of the payment shall be preserved by the Lessee and furnished to the Lessor whenever the same shall be requested."

Section 1 of Article Nine, reads as follows:

> "Nothing in this Indenture, expressed or implied, is intended or shall be construed to give to any person or corporation other than the parties hereto, their successors and assigns, any legal or equitable right, remedy or claim under or in respect of this Indenture or under any covenant, condition or provision herein contained or the guaranty thereof; all the covenants, conditions and provisions herein and in the said guaranty being intended to be and being

Nine makes it perfectly clear that the stockholders of Alabama are neither third-party beneficiaries nor donee beneficiaries of the lessee's promises to the lessor. Section 2 of Article Nine makes equally clear that the lease does not preclude a transfer by merger or sale of the railway and properties of the lessor.

Plaintiff also relies upon the legend endorsed upon his stock certificates as giving him a contractual right against Illinois Central. In this also he is mistaken. The final sentence of the endorsement shows plainly that the obligations of the lessee and guarantor are those expressed in the lease and guaranty, to copies of which the certificate holder is referred for ascertainment of his rights.[4]

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for the sole and exclusive benefit of the parties hereto, their successors and assigns."

Section 2 of Article Nine, reads as follows:

"SECTION 2. Nothing contained in this Indenture shall prevent the transfer by * * * merger with or sale to the Lessee, its successors or assigns, of the railway and properties of the Lessor, or any * * * merger of the Lessee with any other corporation or corporations; * * *. But in case of any such * * * merger * * * (except * * * between the Lessor and the Lessee, its successors or assigns, or between the Lessor and said Guarantor, its successors or assigns), proper provisions shall be embodied in any instrument or instruments effecting the same for the preservation and maintenance of the rental to be paid by the Lessee, its successors or assigns, to the Lessor, as herein provided, * * *."

[4] The complete endorsement reads as follows:

"By an Indenture of lease bearing date the 31st day of March, 1925, and approved by the Interstate Commerce Commission on the 3d day of May, 1926, The Alabama and Vicksburg Railway Company as Lessor, has leased its railroad and the appurtenances thereof and certain other property to The Yazoo and Mississippi Valley Railroad Company, as Lessee, from the day of the approval of the said lease by the Interstate Commerce Commission until the first day of July, 2282, and for such further term for which said lease may be extended as provided therein; and as rental therefor the Lessee has covenanted to pay (inter alia) on the 1st day of April and the 1st day of October in each year during said term, a sum equal to six per cent. (6%) of the par value of the Capital stock of the Lessor issued and

Plaintiff's claim that the Illinois Central is under any contractual duty to him cannot be sustained. His reliance on such cases as *King* v. *Richardson*, 4 Cir. 136 F. 2d 849, cert. den. 320 U. S. 777, to the effect that "merger will not be applied where its effect would be to prejudice the rights of innocent third persons," is misplaced. Much closer in point is *Flagg* v. *Manhattan Ry. Co.*, (C. C. S. D. N. Y.) 10 F. 413.

Plaintiff's second contention which relates to the valuation of his shares of stock is also not sustainable. Because of the broad authority conferred upon the Commission by §5 of the Interstate Commerce Act and the technical complexities of a merger case, the doctrine of administrative finality is particularly applicable. In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, the court approved an order of the Commission under §5, the opinion stating at page 87:

> "* * * Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. * * * 'The wisdom and experience of that Commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' * * * If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are ade-

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outstanding on March 31, 1925; being the equivalent of three per cent. (3%) semi-annually on the amount of said stock now outstanding, to wit: $4,200,000. par value thereof. By an agreement bearing date the 31st day of March, 1925, and approved by the Interstate Commerce Commission on the 3d day of May, 1926, between Illinois Central Railroad Company, and said The Alabama and Vicksburg Railway Company, said Illinois Central Railroad Company has unconditionally guaranteed the due and punctual payment by said Lessee of all sums required to be paid by it under the terms and provisions of said Indenture. For full and more definite statement of the obligations of the Lessee and guarantor, respectively, in the respects above noted, reference is made to the said lease and guaranty copies of which are on file in the office of the Transfer Agent."

quate and supported by evidence, it is not our function to upset its order."[5]

In approving a voluntary merger the Commission must find, first, that it "will be consistent with the public interest"; second, that it is "just and reasonable." See *Schwabacker (sic.) v. United States*, 334 U. S. 182, 194. With respect to the meaning of "just and reasonable" the court said at page 199:

> "* * * In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter [of the state of incorporation] made to him but the current worth of that promise that governs. it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good."

In the case at bar the Commission made an appraisal of what plaintiff is contributing to the merger. Its report states:

> "Upon consideration of all the evidence we are of the opinion and find that the fair values of the considered stocks do not exceed amounts which would be produced by capitalizing the respective dividends at a rate between 4.25 and 4.50 per cent. Capitalizing the dividends at the lower of these rates would produce $141.18 per share for the Alabama stock and $117.65 per share for the Vicksburg stock. However, to avoid any possibility of injustice to the minority stockholders and to afford the present holders of these stocks the same prices which we have heretofore authorized Illinois Central to pay, and in view of the latter's willingness to pay the larger amounts or to exchange its stock upon the basis of the indicated prices, we are of the opinion

[5] See also *Stott et al v. United States et al*, (S. D. N. Y. Oct. 8, 1958) and authorities cited at page 10 of the opinion; *O. C. Wiley & Sons v. United States*, (W. D. Va.) 85 F. Supp. 842, 844, affirmed 338 U. S. 902.

> that it will be consistent with the public interest to approve the merger upon the terms proposed, and that under these terms the holders of the leased lines' stocks will receive the fair economic equivalent of the rights surrendered by them."

Plaintiff contends that the Commission has no authority in law to capitalize the contractual liability of Illinois Central to pay at the rate of $6 and $5 a year, per share, until July 1, 2282. But as we have previously demonstrated Illinois Central is under no such contractual liability to plaintiff. The Commission's capitalization of the present value of future rental payments is generous, and is amply supported by the evidence.

Plaintiff's third contention requires little discussion. Before the hearing examiner plaintiff moved to require the railroad applicants to furnish a statement segregating the traffic revenues derived from operation of the leased properties, in order to determine the value of his stocks from the standpoint of earnings contributed to Illinois Central. The examiner denied the motion and his ruling was sustained, the Commission citing its prior decision, *Delaware L. & W. Co. Merger*, 257 I. C. C. 91, to the effect that where a lease in perpetuity is involved, which for practical purposes the present is, the rental represents the earnings of the property so far as the stockholders of the leased lines are concerned. Plaintiff now urges that the absence of evidence of the earning power and values of the leased lines makes it impossible to ascertain the value of the stock of Alabama and Vicksburg.[6] Plaintiff's argument lacks merit. We agree with the Commission's statement that "For all practical purposes, the stocks of the leased lines have a value to their owners measurable solely by the fixed rental payable under the leases and the divi-

[6] The brief of the United States and the Interstate Commerce Commission contends that plaintiff is precluded from raising this point because he failed to include it in his petition for reconsideration. It is unnecessary to pass on this contention.

dends payable therefrom on the stocks." Plaintiff as a stockholder in Alabama and Vicksburg may have an interest in their separate earning power in 2282, if the leases are not renewed, but at present his only ascertainable interest is in the rental they produce. As said in *Old Colony R. Co.* v. *New York, N. H. & H. R. Co.*, 2 Cir. 98 F. 2d 670, 672 "* * * it is a fanciful notion that one may forecast the future value of a railroad half a century hence."

We find no basis for setting aside the report and order attacked by the complaint. Consequently the complaint should be dismissed. It is so ordered.

THOMAS W. SWAN
Circuit Judge

SYLVESTER J. RYAN
District Judge

WILLIAM B. HERLANDS
District Judge

Judgment entered December 23rd, 1958.

HERBERT A. CHARLSON,
Clerk.

[SEAL]

The Report of the Interstate Commerce Commission is dated April 14, 1958, and it is reported as "Illinois Central Railroad Company—Merger—Alabama & Vicksburg Railway Company", at 295 I. C. C. 731. It is attached to the Complaint, which is in the record.